THE JURISDICTION AND PRACTICE UNDER THE ACT OF CONGRESS, APPROVED JUNE 11th, 1906, RELATING TO THE LIABILITY OF COMMON CARRIERS TO THEIR EMPLOYEES.

It is designed to briefly note the jurisdiction and practice applicable to the recent act of Congress, concerning the liability of common carriers engaged in interstate commerce, under the act approved June 11th, 1906, without attempting any discussion of the constitutionality of the act itself, which is as follows:

"An Act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employees.

"*Be it enacted by the Senate and House of Representatives of United States of America in Congress assembled,* That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect of insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

"Section 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

"Sec. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to

recover damages for personal injuries to or death of such employee: *Provided, however,* That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.

"Sec. 4. That no action shall be maintained under this act, unless commenced within one year from the time the cause of action accrued.

"Sec. 5. That nothing in this Act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees under the safety-appliance Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three."

The statute specifically applies to employees of common carriers, or in case of the death of an employee to his personal representative, for the benefit of his widow and children, etc., and to none others. This is plain, under the title of the act, as well as in the language of the statute itself.

The suits being of a civil nature it is clear that the federal courts will have concurrent jurisdiction with the courts of the several states in all suits instituted under this act in accordance with the first section of the act of 1875, defining the original and general jurisdiction of the circuit courts of the United States, as amended by the act of March 3rd, 1887.

This section as amended, so far as pertinent, is as follows.

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution and laws of the United States * * *."

The injured employee, or his personal representative in case of his death, who desires to enforce any liability incurred under this act may elect to sue either in the courts of the several states, or in the circuit court of the United States, in the latter case only where the jurisdictional amount exceeding $2,000, is involved.

If the plaintiff elects to sue in the state court he must observe

the practice of that court as to the institution and conduct of the proceeding.

In Virginia, therefore, the practice as to the place of the institution of the suit, service of process, etc., would conform to the practice now prevailing in all suits against common carriers that are corporations, and against those other than corporations process would issue in accordance with § 3228, Va. Code.

The suit in the state court must therefore be instituted where the cause of action arose, or at the place of the principal office of the defendant common carrier that is a corporation, and the process, of course, must be served in accordance with the Virginia statute.

It would seem that the employee would have the right to further elect to institute his suit in the courts of the state other than that of which the defendant corporation is a citizen, such place being where the cause of action arose, or he may bring suit at the place of the principal office of the corporation in the state of which it is a citizen, though the cause of action has arisen without that state.

Where the plaintiff elects to sue in the state court the defendant has the right under § 2 of the act of 1875, as amended by the act of 1887, 25 St. L. 433, 1st Sup. Rev. Stat., 2nd Ed, 611, to remove the suit to the circuit court of the United States for the proper district, provided the jurisdictional amount in excess of $2,000, is in controversy. In that court, of course the proceeding will conform to the practice of the federal court obtaining in the respective states from which the case is removed, in accordance with § 914, Rev. State, U. S.

If the amount involved is not in excess of $2,000, the plaintiff, it would seem, must sue alone in the state court. The act of 1875, as amended by the act of March 3rd, 1887, confines the jurisdiction of the circuit court of the United States in civil cases where the sum or value exceeds $2,000; and the defendant in such case would not have the right of removal, the jurisdictional amount not being involved. In cases arising under the act where the amount involved is $2,000, or less, both the plaintiff and the defendant would have the right to rely upon the act in the state court in other respects, and the state court be governed thereby.

The plaintiff can sue in the state court under the act and claim its benefits regardless of the amount in controversy, and regardless of the citizenship of the parties, but the court would of course be governed by the decisions of the federal courts construing and applying the act. Either party, it seems, would be entitled to a writ of error from the final judgment in such cases, under the 25th section of the judiciary act, to the Supreme Court of the United States, where the circumstances necessary for that court to assume jurisdiction concur.

If the state court in such case failed to apply the measure of damages provided under § 2 of the act, or otherwise denied the parties the benefit thereof, it would seem that such decision would permit a writ of error on behalf of the plaintiff or defendant from a final judgment of the state court to the supreme court of the United States.

If the plaintiff elects to sue in the courts of the United States he can only do so where the amount in controversy exceeds $2,000, and must institute his proceeding in the circuit court of the United States having jurisdiction of the place where the cause of action arose, or at the place of the principal office of the defendant common carrier. If the cause of action arises outside of the state of which the defendant common carrier is a citizen, it would seem that the plaintiff would have a right to institute his suit in the circuit court of the United States having jurisdiction of the place in such foreign state where the cause of action arose, or at his election he may sue at the place of the principal office of the common carrier in the state of which it is a citizen.

In some cases, no doubt, the plaintiff, desiring to avail himself of the measure of recovery allowed under the statute, may allege facts sufficient to prevent the declaration being demurrable, but the defendant of course will have the right by proper plea to have those preliminary questions tried, and in all cases the federal court will ultimately be the judge whether or not the liability is enforceable under the act in question.

If the suit is originally instituted in the circuit court of the United States, or removed there by the defendant from the state court, the course of appeal from the circuit court would, of

course, be to the circuit court of appeals for the proper judicial circuit.

It may be, that in such cases the plaintiff may desire to avoid the provisions of § 3 of the act, and may not sue thereunder, but invoke the law of the state. In this event the defendant would, nevertheless, it seems, if the injury in fact occurred while the carrier was engaged in interstate commerce, have the right to rely upon the act and avail itself by proper procedure of the set-off allowed to it under § 3.

In cases not removed or removable from the state courts the trials will be governed by the practice of these courts, though of course the law of the case will be the statute itself as construed and applied by the courts of the United States, and in cases instituted in or removed to the courts of the United States the trials will be in accordance with the federal practice; subject, however, in both courts, to the very far-reaching provisions of § 2 of the act as to contributory negligence, in terms imposing upon the jury the decision of "all questions of negligence and contributory negligence." We do not suppose, however, that even this sweeping provision of the statute deprives the courts, state or federal, of the right of directing or setting aside the verdict of the jury.

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